90-1701

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

FRANK L. BIRD, Trustee of the FRANK L. BIRD PROFIT SHARING TRUST, FRANK L. BIRD, Individually, and JOAN SHEA,

Petitioners,

v.

SHEARSON LEHMAN/AMERICAN EXPRESS, INC. and RAYMOND R. CLEMENTS,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether participants in a qualified Employee Retirement Income Security Act of 1974 (ERISA) plan may be compelled to arbitrate claims of statutory violations asserted against a plan fiduciary, where a provision in an agreement between the employer and a plan fiduciary calls for compulsory arbitration of all claims.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

I. OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Second Circuit of which review is sought is reported at 926 F.2d 116. The unreported decision of the United States District Court for the District of Connecticut reversed by the cited decision is reproduced at Appendix A. A prior opinion by the United

States Court of Appeals for the Second Circuit in the same case and on the same issue is reported at 871 F.2d 292. In that prior decision, the Court of Appeals affirmed an earlier unreported oral decision of the District Court, a transcript of which is reproduced at Appendix B.

II. JURISDICTION

The judgment sought to be reviewed was dated and entered on January 17, 1991. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

III. STATUTES INVOLVED

The statutes involved are the Federal Arbitration Act, specifically 9 U.S.C. §§ 2 and 3 and the Employee Retirement Income Security Act of 1974, specifically 29 U.S.C. §§ 1001(b), 1104, 1132 and 1144. The text of these provisions is reproduced at Appendix C hereto.

IV. STATEMENT OF THE CASE

The Petitioners commenced this action on July 21, 1987, in the United States District Court for the District of Connecticut seeking relief for claimed violations of fiduciary duties under ERISA (29 U.S.C. § 1001 *et seq.*) and "churning" in violation of the Securities Exchange Act of 1934 (15 U.S.C. § 78j), asserting pendent state claims as

well. The complaint alleges that Petitioner Bird is a trustee of, participant in and beneficiary of, and that Petitioner Shea is a participant in, an ERISA qualified profit sharing plan and that the Respondents, a stock brokerage firm and a stock broker respectively, who invested and managed the fund under a standard broker's customer's agreement with Bird, dissipated the fund by "churning" the account. The Respondents are further alleged to be plan fiduciaries within the meanings of ERISA. Jurisdiction of the District Court was invoked under 29 U.S.C. § 1132 (f), 15 U.S.C. § 78aa, 28 U.S.C. § 1331 and 28 U.S.C. § 1332 (a)(1).

The customer agreement signed by Petitioner Bird contained a clause providing for arbitration of disputes arising thereunder. Relying on the decision of this Court in *Shearson Lehman Brothers, Inc. v. McMahon,* 482 U.S. 220 (1987) *reh'g denied* 483 U.S. 1056 (1987), on motion of the Respondents, the District Court ordered a stay of the claims of churning in violation of the Securities Exchange Act of 1934 and the pendent state claims but declined to do so as to the claims of breach of fiduciary responsibility under ERISA.

Respondents appealed the trial court's decision denying the stay as to the ERISA claims under 28 U.S.C. § 1292 (b). In *Bird v. Shearson Lehman/American Express, Inc.,* 871 F.2d 292 (2nd Cir. 1985), the United States Court of Appeals for the Second Circuit affirmed the trial court. Following a denial of Respondent's petition for rehearing, the Respondents petitioned this Court for a writ of certiorari. This Court by summary order on October 10, 1989, vacated the judgment in the Second Circuit,

remanding the case for further consideration in light of *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1987). *Shearson Lehman/American Express, Inc. v. Bird*, 110 S.Ct. 225 (1989). On January 19, 1990, the United States Court of Appeals for the Second Circuit remanded the matter to the District Court with directions to proceed in accordance with the mandate of this Court.

After reconsideration, the District Court reaffirmed its initial decision that claims of breach of fiduciary duties under ERISA were not compulsorily arbitrable under a predispute arbitration agreement. Respondents again appealed and the United States Court of Appeals for the Second Circuit, on that appeal, reversed the District Court. It is this latter judgment on appeal of which review is sought.

V. REASONS FOR ALLOWING THE WRIT

Petitioners respectfully submit that, in the opinion sought to be reviewed, the United States Court of Appeals for the Second Circuit has decided an important question of federal law which has not been, but should be, settled by this Court and that this is an appropriate case for the granting of this petition under Rule 17.1.(c) of the Rules of the United States Supreme Court.

Additionally, the United States Court of Appeals for the Third Circuit has held, in *Barrowclough v. Kidder, Peabody & Co.*, 752 F.2d 923 (3rd Cir. 1985) (albeit a decision prior in time to the decisions of this Court in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220

(1987), and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989)) that ERISA claims such as those asserted in this action cannot be compulsorily arbitrated pursuant to predispute arbitration clauses in brokers' customer agreements. The only other Court of Appeal to have considered the issue is that of the Eighth Circuit in *Sulit v. Dean Witter Reynolds, Inc.*, 847 F.2d 475 (1988), a case decided subsequent to *McMahon* but prior to *Rodriguez de Quijas*, holding that such claims are compulsorily arbitrable. Thus, the Circuit Courts are now in conflict on this issue, justifying the granting of this petition under Rule 17.1.(a) of the Rules of the Supreme Court.

Neither *McMahon* nor *Rodriguez de Quijas* speaks directly to the issue in this case. Indeed, neither dealt with the enforceability of predispute arbitration clauses in agreements to which the persons intended to be protected by comprehensive legislative schemes like ERISA are customarily not party. The closest analogy to ERISA claims like those asserted here is not the commercial disputes of which *McMahon* and *Rodriguez de Quijas* are representative but the labor cases where this Court has consistently allowed claimants to vindicate their statutory rights in the judicial forum provided. See *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974); *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984). This Court itself has recognized the striking parallels between the remedies and forum for realization of them provided under the Labor Management Relations Act, 29 U.S.C. § 1985 and § 1132(a) of ERISA. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

To similar effect, the Third Circuit, in a post-*Rodriguez de Quijas* case, held claims arising under the Age Discrimination in Employment Act, 29 U.S.C. § 2121, not subject to compulsory arbitration, *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (3rd Cir. 1989). As the Third Circuit in *Nicholson* aptly noted, "[t]he dissent relies on cases arising in a business context. The closest analogous Supreme Court cases dealing with employees' statutory rights point in the other direction." *Nicholson*, p. 231. Also following the lead of the Supreme Court in its solicitousness for the integrity of statutory programs protective of the worker, the First Circuit, again post-*Rodriguez de Quijas*, has held Title VII claims not compulsorily arbitrable even outside the collective bargaining context. *Utley v. Goldman Sachs & Co.*, 883 F.2d 184 (1989), *cert. denied* 110 S.Ct. 842 (1990).

Respondents reported in their petition for certiorari seeking review of the first decision of the Second Circuit in this case that "there are millions of ERISA accounts maintained with brokerage firms nationwide." (Respondent's Petition for Writ of Certiorari dated August 7, 1989, page 19.) Thus multiples of those millions, the workers whom ERISA was intended to protect, will be affected by this Court's disposition of this petition. The issue is a narrow but difficult one, reflected in the fact that each of the decisions in this case in the Second Circuit was accompanied by a dissent. To paraphrase *Nicholson*, if the employers arbitration agreement effectively precludes an employee from bringing claims of breach of fiduciary responsibility under ERISA in the judicial forum, it may be assumed that many employers will execute similar agreements, thereby shifting enforcement of ERISA away

from the Secretary of Labor and away from the courts to arbitration. "If this is a result desired by Congress, we should wait for Congress to explicitly so state." *Nicholson*, p. 231. It is not only the workers in that case who will lose access to the federal courts; the very development of a federal common-law of employee benefits which ERISA was intended to promote will be thwarted. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41 (1987); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989).

For these reasons, the Petitioners respectfully urge that this petition be granted.

Hartford, Connecticut
April 12, 1991

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APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

FILED
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U.S. DISTRICT COURT
NEW HAVEN, CONN.

FRANK L. BIRD, Trustee of the Frank L. Bird Profit Sharing Trust, FRANK L. Bird, Individually, and JOAN SHEA :

v. : Civ. No. H-87-530 (JAC)

SHEARSON LEHMAN/AMERICAN EXPRESS INC., AND RAYMOND R. CLEMENTS :

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RULING ON REMAND FROM THE COURT OF APPEALS

JOSÉ A. CABRANES, District Judge:

This case has been remanded by the Court of Appeals for the limited purpose of reconsidering the issue of whether a fiduciary responsibility claim under the Employee Retirement Income Security Act (ERISA) is subject to compulsory arbitration in light of the Supreme Court's decision in *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 109 S.Ct. 1917 (1989) ("*Rodriguez*"). Because *Rodriguez* is consistent with the Supreme Court's other recent rulings on arbitration and therefore does not significantly change the legal landscape in which this issue was originally considered, I continue to hold that fiduciary responsibility claims[1] under ERISA are not subject to compulsory arbitration.

Procedural History

This case was originally filed on July 21, 1987. Plaintiffs Frank L. Bird, a trustee and beneficiary of the Frank L. Bird Profit Sharing Trust ("the Plan"), and Joan Shea,

[1] The Court of Appeals' decision recognized a distinction between "purely contractual claims" and "fiduciary claims" – that is, "claims created as part of a comprehensive federal scheme protecting the rights of individual participants and beneficiaries." The same distinction is drawn by the statute, which allows contractual claims to be heard in state court, but gives federal courts exclusive jurisdiction over fiduciary claims. *See* 29 U.S.C. § 1132(e). The Court of Appeals stressed that its holding did *not* cover contractual claims. "We do not suggest that arbitration of purely contractual claims asserted pursuant to ERISA cannot be compelled." 871 F.2d at 298.

a beneficiary of the Plan, allege, *inter alia,* that defendants' handling of the Plan's funds constituted a breach of fiduciary duties under ERISA, 29 U.S.C. § 1104. Plaintiffs assert that defendants, an investment firm and its vice president, solicitated the management of the Plan's account and were aware of its conservative investment objectives. After twenty-two months and fifty-five transactions, the $62,205.56 from the Plan invested with defendants was reduced to $13,427.53, and plaintiffs claim that many of the investments made on their behalf were improperly risky.

On August 18, 1987, the defendants filed a motion to compel arbitration and to stay the action pending arbitration. At a hearing on April 4, 1988, I held that an enforceable arbitration agreement existed and that the motion should be granted as to the securities claims, but that the ERISA claims were not subject to compulsory arbitration. On August 23, 1988 the defendants filed a notice of appeal as to the ruling on the ERISA claims, and on March 28, 1989, the Court of Appeals for the Second Circuit affirmed that ruling, having considered the issue *de novo,* 871 F.2d 292, 294 n. 4 ("A denial of a motion to compel arbitration is subject to *de novo* review. [citation omitted]"). The Supreme Court, on October 10, 1989, vacated by summary order the Court of Appeals' judgment and remanded the cause for reconsideration in light of *Rodriguez.* 110 S.Ct. 225 (1989). On January 19, 1990, the Court of Appeals, in turn, remanded the case to this court "with directions to proceed in accordance with the mandate of the Supreme Court."

Discussion

Rodriguez does not alter the basic framework, set out in *Shearson/American Express, Inc. v. McMahon,* 107 S.Ct. 2332 (1987), within which issues of arbitrability are determined. "The Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, provides the starting point . . . [and t]he burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies. . . ." *Id.* at 2337. Such congressional intent " 'will be deducible from [the statute's] text or legislative history,' or from an inherent conflict between arbitration and the statute's underlying purposes." *Id.* (citations omitted; brackets in original).

This court has been authorized and directed only to reconsider its decision in this case in light of *Rodriguez.* While *Rodriguez* overruled *Wilko v. Swan,* 346 U.S. 427 (1953), it confirmed, rather than departed from, the Court's other recent decisions about arbitrability. *Wilko* had found claims under the Securities Act of 1933 not to be subject to compulsory arbitration. During the last decade, the Court has recognized arbitration as a legitimate alternative to formal litigation and has been less willing to find federal statutory rights exempt from arbitration agreements. As the Court noted in *Rodriguez,*

> [t]he shift in the Court's views on arbitration away from those adopted in *Wilko* is shown by the flat statement in *Mitsubishi [Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 628 (1985)]: "By agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."

109 S.Ct. at 1920. Other cases besides *Mitsubishi* confirmed this change in perspective. *See Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24 (1983); *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985).

While *Wilko* was not formally overruled until *Rodriguez*, the anti-arbitration perspective underlying *Wilko* had been discredited by *McMahon, supra*. In *McMahon*, the Court explained that changing conditions cast doubt on the earlier decision:

> [T]he mistrust of arbitration that formed the basis for the *Wilko* opinion in 1953 is difficult to square with the assessment of arbitration that has prevailed since that time. . . . Even if *Wilko*'s assumptions regarding arbitration were valid at the time *Wilko* was decided, most certainly they do not hold true today for arbitration procedures subject to the SEC's oversight authority.

107 S.Ct. at 2341. In fact, the Court explicitly noted that it was limiting *Wilko* and disapproved of that case's holding, "While *stare decisis* concerns may counsel against upsetting *Wilko*'s [result] under the Securities Act, we refuse to extend *Wilko*'s reasoning to the Exchange Act in light of these intervening regulatory developments." *Id.*

Given how strongly *Wilko* was already disfavored at the time the instant case was first considered, I am not persuaded that a different result should be reached in light of *Rodriguez*. The first prong of the analysis under *McMahon*, whether the text and legislative history of ERISA preclude arbitration, is not significantly affected by *Rodriguez*. In holding that ERISA claims for breach of

fiduciary duty are not arbitrable, the Court of Appeals found ERISA's generous provisions for access to the federal courts "persuasive evidence that Congress intended disputes under the statute to be resolved in a federal judicial forum." *Bird*, 871 F.2d at 297. *Rodriguez* arguably makes that evidence somewhat less persuasive, because the 1933 Act – which *Rodriguez* found arbitrable – contains similar provisions to preserve access to federal courts.[2] However, at least two other statutes with provisions for increased access to the federal courts, the Securities Exchange Act of 1934 and the antitrust laws,[3] had already been found arbitrable, so the impact of *Rodriguez* is only marginal. That decision does not disturb the Court of Appeals' assessment that "Federal court access for pension claimants and beneficiaries was explicitly included [by Congress] as a key ingredient of [ERISA.]" 871 F.2d at 297.

Turning to the second prong of the *McMahon* test, the overruling of *Wilko* does not alter the Court of Appeals' basic assessment that ERISA – when used to ensure fiduciary duties as opposed to enforcing the provisions of a specific plan – is a "remedial statute designed to 'curb

---

[2] *See* 15 U.S.C. § 77v(a) (1933 Act provisions) and 29 U.S.C. § 1132 (ERISA provisions).

[3] *See McMahon, supra,* and *Mitsubishi, supra; see generally* Shell, "ERISA and Other Federal Employment Statutes: When Is Commercial Arbitration an 'Adequate Substitute' for the Courts?" 68 Texas Law Review 509, 557 (1990) ("The special procedural protections ERISA provides claimants are not unique to the statute and do not answer the question of arbitrability. . . .").

. . . abuses of employee pension and welfare benefit plans by establishing minimum federal standards.' " 871 F.2d at 296-97 (relying on statutory language).

Rodriguez also does not alter the Court of Appeals' proper reliance on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) and *McDonald v. City of West Branch*, 466 U.S. 284 (1984) for the proposition that "[w]hen enacting remedial legislation, Congress has limited or prohibited waiver of a judicial forum. Most often these injunctions occur in statutes designed to provide minimum substantive guarantees." *Id.* at 295. Finally, because *Rodriguez* does not alter the character of ERISA or the general rule that such federal minimum substantive guarantees are not suitable for arbitration, it does not alter the conclusion that ERISA claims for breach of fiduciary duty (as opposed to ERISA claims for benefits under the provisions of a particular plan) are not subject to compulsory arbitration.

CONCLUSION

Accordingly, this court finds that the ERISA claims are not subject to compulsory arbitration and the Motion for an Order Staying Proceedings Pending Arbitration is DENIED.

It is so ordered.

Dated at New Haven, Connecticut this 16th day of July, 1990.

/s/ José A. Cabranes
José A. Cabranes
United States District Judge

APPENDIX B

THE COURT: Thank you. Please be seated.

The Court is prepared to rule now on the pending Motion to Compel Arbitration, based upon a consideration of the full record in this case, including the arguments of counsel at today's hearing.

In Shearson/American Express, Inc. v. McMahon, 107 S.Ct. 2332 (1987), the Supreme Court reaffirmed that The Federal Arbitration Act, 9 U.S.C. sections 1 et seq., "standing alone, mandates enforcement of agreements to arbitrate statutory claims." Id. at 2337.

Our Court of Appeals has set forth the issues to be addressed by a district court upon a motion to compel arbitration: "first, (the court) must determine whether the parties agreed to arbitrate . . .; second, it must determine the scope of that agreement; third, if federal statutory claims are asserted, it must consider whether Congress intended those claims to be nonarbitrable . . .; and fourth, if the court concludes that some, but not all, of the claims in the case are arbitrable, it must then determine whether to stay the balance of the proceedings pending arbitration." Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840, 844 (2d Cir. 1987).

As to the first factor – whether the parties agreed to arbitrate – plaintiffs contend that, as Trust participants and beneficiaries, they did not sign the Customer Agreement and thus were not parties to the arbitration agreement.

As Trustee, however, Frank L. Bird had the authority to bind the participants and beneficiaries to arbitration of "any controversy arising out of or relating to" the Trust Account. See Barrowclough v. Kidder, Peabody & Co., Inc., 752 F.2d 923, 938 (3d Cir. 1985) (observing that "a variety of non-signatories of arbitration agreements have been held to be bound by such agreements under ordinary common law contract and agency principles"); Fisser v. International Bank, 282 F.2d 231, 233-34 (2d Cir. 1960); Steinberg v. Illinois Co., Inc., 635 F.Supp. 615, 617 (N.D. Ill. 1986).

The Court finds, therefore, that plaintiffs agreed to arbitrate.

The second issue to be addressed is the scope of the agreement. The final sentence of the arbitration provision reads:

"This agreement to arbitrate does not apply to any controversy with a public customer for which a remedy may exist pursuant to an expressed or implied right of action under certain of the federal securities laws."

Relying on this final sentence, plaintiffs contend that their claims brought under the federal securities laws, namely section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. section 78j and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. section 240-10b-5, are not within the scope of the agreement.

The Court finds, however, that this provision of the arbitration agreement was simply a disclosure statement mandated by Rule 15c2-2 of the Securities and Exchange Commission, 17 C.F.R. section 240.15c2-2. See Fisher v.

Prudential-Bache Securities, Inc., 635 F.Supp. 234, 236-37 (D. Md. 1986); Finkle and Ross v. A.G. Becker Paribas, Inc., 622 F.Supp. 1505, 1510 (S.D.N.Y. 1985).

The third factor to be considered is whether Congress intended plaintiffs' claims under section 10(b) and ERISA to be nonarbitrable.

The United States Arbitration Act, 9 U.S.C. sections 1-14, constitutes "a congressional declaration of a liberal federal policy favoring arbitration agreements." Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 460 U.S. 1, 24 (1983).

To override the Arbitration Act, the party opposing arbitration must "show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue." McMahon, 107 S.Ct. at 2337. Such an intent may be deduced from the statute's text or legislative history, or from an inherent conflict between arbitration and the statute's underlying purpose. See id. The Supreme Court has resolved the issue with respect to section 10(b) by holding that agreements to arbitrate claims under that statute are enforceable. See id. at 2343.

With respect to statutory claims under ERISA, however, this Court comes to a different conclusion. While recognizing that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitrability," Moses H. Cone Memorial Hospital, 460 U.S. at 24-25, the Court nevertheless concludes that access to a federal judicial forum is central to ERISA's underlying purpose to provide maximum protection to plan participants and beneficiaries. See 29 U.S.C. section 1001(b)

(stating congressional policy to provide "ready access to the Federal courts"); see also Borrowclough, 752 F.2d at 936 (holding that statutory claims are not arbitrable under ERISA); Lewis v. Merrill Lynch, 431 F.Supp. 271, 276 (E.D.Pa. 1977) (finding that "in passing ERISA Congress intended to protect plan participants from arbitration and similar agreements, often unilaterally imposed, which 'snip and whittle' at federally granted rights").

This policy of "ready access" can also be discerned in ERISA's provision for exclusive federal court jurisdiction over claims alleging statutory violations and its liberal rules governing service of process, venue, attorney fees and statutes of limitation. See Murphy, The Impact of ERISA on Arbitration, 32 Arb. J. 123, 129 (1977); see also Schneider, Surviving ERISA Preemption: Pension Arbitration in the 1980's, 16 Columbia Journal of Law and Soc. Prob. 193, 284-85 (1980).

Similar agreements to arbitrate have been held unenforceable under the antitrust laws, see American Safety Equipment Corp. v. J.P. Maguire & Co., 391 F.2d 821 (2d Cir. 1968), and Title VII of the Civil Rights Act of 1964, see Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).

Accordingly, the Court holds that statutory claims brought to enforce the fiduciary responsibility provisions of ERISA are not subject to arbitration.

Finally, because the section 10(b) claims are subject to arbitration and the ERISA claims are not, the Court must determine whether to stay the federal proceedings pending arbitration.

In the interest of a speedy resolution to this controversy, and because the section 10(b) and the ERISA claims are not clearly identical and neither have any necessary temporal priority over the other, the Court concludes that the arbitration and the lawsuit should each proceed in its normal course. See Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 221 (1985); Dimenstien v. Whiteman, 759 F.2d 1514, 1517 (11th Cir. 1985); Steinberg, 735 F.Supp. at 620.

Accordingly, for the reasons already stated, defendants' motion to compel the section 10(b) claims is granted.

Defendants' motion to compel the ERISA claims is denied. The Motion to Stay Action Pending Arbitration is also denied.

Finally, based upon a consideration of the full record of this case, plaintiffs' oral application for costs pursuant to Federal Rules of Civil Procedure 11 is denied.

It is so ordered.

We are adjourned.

* * *

APPENDIX C

STATUTORY PROVISIONS INVOLVED

United States Arbitration Act

9 U.S.C. § 2:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 3:

> If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Employee Retirement Income Security Act

29 U.S.C. § **1001. Congressional findings and declaration of policy**

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

29 U.S.C. § **1104. Fiduciary duties**

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and –

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

(b) Indicia of ownership of assets outside jurisdiction of district courts

Except as authorized by the Secretary by regulation, no fiduciary may maintain the indicia of ownership of any assets of a plan outside the jurisdiction of the district courts of the United States.

(c) Control over assets by participant or beneficiary

In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary) –

(1) such participant or beneficiary shall not be deemed to be a fiduciary by reason of such exercise, and

(2) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control.

29 U.S.C. § 1132. **Civil enforcement**

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place or where a defendant resides or may

be found, and process may be served in any other district where a defendant resides or may be found.

29 U.S.C. § **1144. Other laws**

(d) Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited

Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 1031 and 1137(b) of this title) or any rule or regulation issued under any such law.